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No. 98-1701

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GARY LOCKE, GOVERNOR OF WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Ninth Circuit held in this case that state rules governing the operation of oil tankers and the staffing, training and qualifications of their officers and crew are categorically *not* preempted, even if they conflict with Coast Guard regulations. As we explain in the petition, that holding cannot be reconciled with this Court's decision in *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), or with the text and structure of the Ports and Waterways Safety Act of 1972 (PWSA) and the Oil Pollution Act of 1990 (OPA). See Pet. 14-24. We also explain that the decision below gravely impairs the longstanding authority of the Coast Guard to establish uniform national standards for vessels in interstate and foreign commerce, undermines the United States' binding commitments to the existing international regime of shipping regulation, and threatens the ability of the United States to speak with one voice in the future development of international standards to promote vessel safety and protect the marine environment. See Pet. 24-30.

Respondents do not dispute that the question presented is important, nor do they take issue with our submission regarding the international repercussions of the decision below, which are evidenced by the diplomatic protests of 14 of this Nation's major maritime trading partners. See Pet. 26-27. Rather, respondents oppose certiorari principally on the

grounds that the decision below is correct and that Congress has authorized the states unilaterally to dismantle the regime of national and international tanker regulation in the manner approved by the court of appeals. That submission is without merit.

1. The decision below squarely conflicts with this Court's decision in *Ray*. There, the Court held that Title II of the PWSA regulates the field of tanker design, equipment, and construction, and that any state law on those subjects is therefore automatically preempted. 435 U.S. at 160-168. The Court further held that, although Title I of the PWSA does not similarly preempt the entire field of the operation of vessels in local waters, a state law within that field *is* preempted if the Coast Guard has promulgated a regulation on the same subject. *Id.* at 171-178; see Pet. 15-16.

Respondents Natural Resources Defense Council, et al. (NRDC), dispute the latter point, relying on the statement in *Ray* that, "[o]f course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." Br. in Opp. 16-17 (quoting 435 U.S. at 168-169). But that sentence does not mean that all state laws addressing subjects other than design and construction are categorically saved from preemption. To the contrary, the Court referred to state rules that are "otherwise valid," and it then proceeded to consider whether state rules governing the operation of vessels in Puget Sound were preempted under Title I of PWSA. See 435 U.S. at 171-178.[1]

[1] Remarkably, NRDC contends (Br. in Opp. 19) that a Ninth Circuit decision, *Chevron U.S.A., Inc.* v. *Hammond*, 726 F.2d 483 (1984), cert. denied, 471 U.S. 1140 (1985), "explicitly limited the holding of *Ray* to 'design characteristics,' and acknowledged the obligation of tankers to meet otherwise valid state regulations that do not constitute design or construction obligations." The Ninth Circuit, of course, would have had no authority to "explicitly limit" the holding of this Court in the manner NRDC suggests, and in fact it did not do so. It observed only that the *field preemption* analysis in *Ray* was limited to design and construction, which were governed by Title II of the PWSA while specifically noting that *Ray* also held that certain other state rules *were* preempted under Title I. See *id.* at 487 & n.5. Accord *Beveridge* v. *Lewis*, 939 F.2d 859, 861-863 (9th Cir. 1991) (cited at State Br. in Opp. 16)).

Significantly, moreover, less than eight months after *Ray* was decided, Congress revised and reenacted both Title I and Title II of the PWSA, without disturbing the Court's holdings in *Ray* regarding the preemptive force of Coast Guard regulations. See Port and Tanker Safety Act of 1978, Pub. L. No. 95-474, 92 Stat. 1471. In doing so, Congress directed the Coast Guard to consult with and consider the views of "officials of State and local governments" before issuing regulations under the PWSA. §§ 2, 5, 92 Stat. 1478, 1484 (now codified at 33 U.S.C. 1231(b)(2), 46 U.S.C. 3703(c)(2)). As we explain in the petition (at 21), those provisions plainly do not contemplate that—after the Secretary has considered the States' views, taken international standards and other relevant factors into account, and elected to adopt uniform national standards on a particular subject—the states are then free to adopt divergent laws on the very same subject.

2. The State concedes that a state rule governing the operation of oil tankers or the staffing, training and qualifications of their officers and crew is preempted under *Ray* if it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." Br. in Opp. 17; see *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). The State argues, however, that all of its Best Achievable Protection (BAP) rules survive that standard, for three reasons. None has merit.

a. The State contends (Br. in Opp. 24) that a state rule is preempted under the PWSA only if it is impossible for a vessel to comply with both the Coast Guard regulation and the

state rule. That argument is incorrect. In *Ray*, this Court held that the State's rule barring all vessels in excess of 125,000 DWT from Puget Sound was preempted not because it would have been impossible for a vessel to comply with both that rule and the Coast Guard's more limited rule (since a vessel in excess of 125,000 DWT could have complied with both if it stayed out of Puget Sound altogether), but because the Coast Guard had taken a different approach and decided not to impose a complete prohibition. See 435 U.S. at 173-178; accord *id.* at 171-173 (similar analysis of state tug-escort rule). Furthermore, as the State elsewhere concedes, physical impossibility is only one ground for finding conflict preemption; state law also is preempted if it stands as an obstacle to the full accomplishment of Congress's purposes (see Br. in Opp. 11, 17)—as *Ray* itself makes clear, both in its recitation of general preemption principles, see 435 U.S. at 158 (quoting *Hines*, 312 U.S. at 67), and in its preemption holdings under Title I of the PWSA, 435 U.S. at 169-178.

b. The State also contends (Br. in Opp. 18-24, 25) that its rules are not preempted because they serve the same general purpose as the PWSA—the prevention of oil spills. A mere similarity of general purposes, however, does not save state law from preemption; the preemption inquiry turns on how the federal law achieves its purposes. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice —and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987).

That principle applies with particular force here, because the protection of oil spills is not the only (much less unyielding) purpose of the PWSA. As this Court explained in *Ray*, the PWSA embodies a considered judgment by Congress that the Coast Guard must have authority to adopt uniform

national rules when it finds that approach appropriate after balancing all relevant considerations, see 435 U.S. at 161-168, and that even on matters of more local concern, the decision as to what standards will govern should be made by a single entity (the Coast Guard), rather than by the 23 coastal states, each acting individually, see *id.* at 169-171, 175-178. The PWSA also embodies a judgment by Congress that issues concerning the design and construction of both United States and foreign-flag tankers and the staffing, duties and qualifications of their officers and crew should be addressed through a system of international negotiation and reciprocity, and that the Coast Guard must be able to pursue that approach so that the Nation may speak with one voice and promote workable international standards. See *id.* at 166-168; Pet. 2-7, 21-22, 24-28. Respondents' view that any state law that purports to promote the prevention of oil spills is not preempted ignores those weighty congressional objectives.

c. Ultimately, the State relies on Section 1018 of OPA, 33 U.S.C. 2718, in arguing that all of its rules are valid. See Br. in Opp. 18-22. Thus, the State asserts that Congress "used very broad language in subsections (a)(1) and (c)(1) to signify its intent that *no* areas of state authority over the discharge of oil were preempted" (see Br. in Opp. 19), and that OPA therefore divested the Coast Guard of the power this Court had previously recognized in *Ray* to issue regulations that preempt state rules (Br. in Opp. 28-30). See also NRDC Br. in Opp. 2-4, 13-16, 21-23. The text of Section 1018 refutes that assertion. Section 1018 provides only that "[n]othing in this Act"—*i.e.*, nothing in OPA itself—shall affect the authority of the States to impose certain requirements. It in no way affects the preemptive effect of *other* Acts, such as the PWSA, or of Coast Guard regulations issued under those Acts. See Pet. 22. To the contrary, the Conference Report on OPA expressly states that it "does not disturb the Supreme Court's decision in *Ray* v. *Atlantic Richfield*

Company, 435 U.S. 151 (1978)," H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. 122 (1990), which confirmed the preemptive effect of Coast Guard regulations issued under the PWSA.[2]

The State attempts to explain away the Conference Report's affirmation of *Ray* by asserting that "*Ray* held only that the field of tanker design and construction was preempted." Br. in Opp. 22. Having misstated the holding in *Ray* (see pp. 2-3, *supra*), the State then imputes its misunderstanding to the Conference Committee that inserted Section 1018. Congress's intent not to "disturb" the "decision" in *Ray* must include *Ray*'s holding that Coast Guard regulations addressing other subjects under the PWSA preempt conflicting state rules.

Unlike respondents, the court of appeals recognized that Section 1018 by its terms does not apply to the PWSA or other statutes that confer authority on the Coast Guard to issue regulations that preempt state law. See Pet. App. 11a-12a. The court nevertheless held that Section 1018 of OPA, as Congress's most recent statute in the field, has a sort of penumbral effect that divests the Coast Guard of that authority under other statutes. *Id.* at 15a-16a. Respondents make no effort to defend that startling proposition, which cannot in any event be reconciled with the bedrock principle under the Constitution that Congress can change the law only by passing a new law. See Pet. 22.

The Ninth Circuit's ready acceptance of the notion that nothing more than the general tenor of OPA could divest the Coast Guard of its preemptive authority in an area so dominated by national and international interests contrasts

[2] The legislative history of OPA quoted by the State (Br. in Opp. 20-22) similarly shows only that Congress did not intend for OPA to preempt state law in certain respects. And contrary to NRDC's contention (Br. in Opp. 23-24), the statements of Coast Guard officials it quotes in no way suggest that OPA freed States to adopt rules that conflict with Coast Guard regulations.

sharply with the First Circuit's recent decision in *National Foreign Trade Council* v. *Natsios*, No. 98-2304, 1999 WL 398414 (June 22, 1999). There, the court noted that "[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs." 1999 WL 398414, at *31. The First Circuit therefore rejected Massachusetts's "unilateral strategy toward Burma [in imposing trade sanctions, because that approach] directly contradicts the federal law's encouragement of a multilateral strategy." *Id.* at *35. The Ninth Circuit, by contrast, has permitted Washington to embark on a "unilateral strategy" of tanker regulation, notwithstanding that the Coast Guard, pursuant to congressional directives, has worked with other nations to develop a multilateral, international regime.[3]

3. For the foregoing reasons, the Coast Guard plainly retains its power to issue regulations that preempt state rules on the same subject. Coast Guard regulations may have that effect where they expressly provide that state rules are preempted (see 98-1706 Intertanko Pet. 7-8, 22-23), or where the state rules would conflict with Coast Guard regulations. Without attempting to canvas all of the Washington rules that are (or may be) preempted (see *id.* at 11), we shall briefly respond to the State's contention (Br. in Opp. 25-28) that its rules addressing the four subjects discussed in our petition for certiorari (at 17-20) do not conflict with Coast Guard regulations.

Operating Procedures; Restricted Visibility. Enforcement of the BAP rules establishes a direct conflict with federal

[3] The First Circuit in *NFTC* also rejected the proposition, relied upon by the Ninth Circuit in this case, that "the fact that state and federal legislation share common goals, either in whole or in part, is * * * sufficient to preclude a finding of preemption," concluding that "[t]he crucial inquiry is whether a state law impedes the federal effort." 1999 WL 398414, at *35.

regulations regarding crew rest. Although the State asserts (Br. in Opp. 26) that its regulations have little practical conflicting consequence because they only apply to "the 60 miles between buoy J and Port Angeles where pilotage waters begin," that assertion is incorrect. To comply with the additional watch functions prescribed by the state BAP rules, a vessel would have to encroach by at least 4 hours into the mandated rest period. See Pet. 17. That encroachment occurs in violation of federal regulations, which the State cavalierly dismisses with the opinion that "additional rest for a crewman might be required later." Br. in Opp. 26.

Drug and Alcohol Testing and Reporting. The State contends (Br. in Opp. 27) that its BAP rules do not conflict with international standards because those standards are merely "guidance." The State ignores, however, that its rules differ from the Coast Guard's regulations, and it does not deny that its rules purport to apply to vessel activities anywhere in the world, even to vessels that might arrive in Washington waters weeks or months later. See Pet. 18.

Crew Training Policies. The State insists that we are "simply wrong" (Br. in Opp. 27) in noting that the training required by the State goes beyond national and international standards, but the most it is prepared to say is that its rule is "very similar" to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers. That bare assertion is scarcely sufficient to establish that the state training requirements are not preempted. Moreover, even if the state rule on this or some other subject is substantively the same as that set forth in Coast Guard regulations or international standards, the assertion by a State of independent authority to enforce its own rules against foreign vessels would seriously disrupt the federal scheme. See pp. 9-10, *infra*; Pet. 5-7, 19.

Language Proficiency Requirements. The State contends (Br. in Opp. 28) that its rule is "consistent with the international standard," but that contention is patently incorrect.

As we explain in the petition (Pet. 19-20), and, which the State makes no real effort to rebut, there is a significant difference between an officer's being able to communicate with those who are part of the navigation watch with respect to matters of watchkeeping, and an officer's being able to "speak a language understood and spoken by subordinate officers and unlicensed crew," Wash. Admin. Code § 317-21-250(1) (1998), most of whom bear no relation to the watchkeeping function.

Although the State disagrees with our analysis of the conflicts as to particular rules, and presumably others that should be assessed on remand, the State does not appear to contest our central contention—that the preemption question should have been assessed by the courts below on a rule-by-rule basis to determine which state rules conflict with Coast Guard regulations. See *Ray*, 435 U.S. at 158. That approach best balances the true federalism interests: leaving room for the exercise of state police powers in areas not preempted by federal regulations, while ousting particular rules that frustrate the accomplishment of federal objectives. That approach cannot be implemented, at least on the West Coast, so long as the Ninth Circuit's decision stands.

4. The decision below has significant adverse repercussions for the United States' ability to fulfill its international obligations and to engage in multilateral negotiations regarding international shipping. The State argues that "the claim of international uniformity is illusory," Br. in Opp. 23, largely because of difficulties with foreign flag vessels' alleged noncompliance with safety rules. Whatever difficulties arise because of episodic noncompliance by vessel operators can be and are addressed by policing efforts by the appropriate authorities (*i.e.*, the U.S. Coast Guard) at the port of entry.[4] The State is simply wrong in asserting (Br. in Opp.

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[4] The State misunderstands the Coast Guard's responsibilities, which include inspecting foreign flag vessels that enter United States ports for

24) that "allowing States to apply their health and safety laws to oil tankers does not impair a uniform international system, because international uniformity is lacking": by longstanding arrangement, the policing of such matters regarding oil tankers occurs at the national and international levels. See Pet. 7.

In the PWSA, Congress specifically provided that tank vessels carrying oil are permitted to operate in the United States waters "only if the vessel has been issued a certificate of compliance by the Secretary." 46 U.S.C. 3711(a). Congress did not confer on states the authority to oust the federal enforcement regime through the promulgation of different rules or the application of different enforcement standards to state rules that are identical or similar to federal regulations. It is the responsibility of Congress and the Executive Branch, and not individual states, to address whatever problems may exist regarding foreign flag compliance with national and international rules. The fact that *Congress* has chosen to depart in certain narrowly targeted respects from an internationally uniform set of rules does not mean that the *states* may balkanize the rules that govern interstate and international shipping in the United States.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

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compliance with national and international rules and, if necessary, detaining vessels that do not comply. Thus, the responsibility for enforcement does not fall solely on the flag nation, but also includes an important role for port-nation control inspections when foreign flag vessels enter another country's port. See *Procedures for Port State Control*, International Maritime Organization Assembly Res. A.787(19) ¶¶ 1.1, 1.3.2, 1.3.3, 2.1, 2.2, 2.6 (Nov. 23, 1995).